Supreme Court, U. S.
MAY 1 1975

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1419

JOHN C. DANFORTH,
Attorney General of the State of Missouri,
Appellant,

vs.

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., MICHAEL FREIMAN, M.D., and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

JURISDICTIONAL STATEMENT

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

JURISDICTIONAL STATEMENT

Appellant John C. Danforth, Attorney General of the State of Missouri, brings this direct appeal from that part the "Order, Judgment and Decree" entered by the United States District Court for the Eastern District of Missouri (William H. Webster, Circuit Judge; Roy W. Harper and H. Kenneth Wanglin, District Judges), which declares unconstitutional Section 6(1) of House Committee Substitute for House Bill No. 1211, 77th General Assembly of Missouri, Second Regular Session, and from the order entered February 12, 1975, by said three-judge court denying appellant's "Motion to Alter or Amend Judgment" in regard to Section 6(1).

CITATION TO OPINION BELOW

The "Memorandum Opinion," the "Order, Judgment and Decree" entered pursuant thereto, and the order of February 12, 1975, denying appellant's "Motion to Alter or Amend Judgment" entered in Cause Number 74-416C(A) have not yet been reported. The complete text of the opinion and orders referred to above is set out in the Appendix at pages A-1 through A-40.

JURISDICTION

In accordance with Supreme Court Rule 15(1b), the jurisdiction of this Court is grounded upon the following:

(i) On June 17, 1974, Appellees Planned Parenthood of Central Missouri, a Missouri Corporation, David Hall, M.D., and Michael Freiman, M.D.,[1] filed a "Verified Complaint for Declaratory Judgment and Injunctive Relief," alleging federal jurisdiction pursuant to 28 U.S.C. Sections 1331, 1343, 2201, 2202, 2281 and 2284, and 42 U.S.C. Section 1983. Appellees challenged the constitutionality of House Committee Substitute for House Bill No. 1211, passed by the Missouri General Assembly on April 30, 1974, and signed into law by the Governor of the State of Missouri on June 14, 1974. In addition to a declaration of unconstitutionality, appellees prayed that appellant and the Circuit Attorney of the City of St. Louis be enjoined from enforcing the chal-

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[1] Throughout this Jurisdictional Statement, these appellees, plaintiffs below, will be referred to as "appellees." Pursuant to Supreme Court Rule 10, J. Brendan Ryan, Circuit Attorney of the City of St. Louis, a defendant below, has been designated an appellee in the style but is not included in any reference to appellees herein.

lenged provisions of House Bill No. 1211. A statutory three-judge court was convened on June 19, 1974, pursuant to 28 U.S.C. Sections 2281 and 2284. Trial of this cause was conducted on July 22 and 23, 1974.

(ii) On January 31, 1975, an opinion and order were entered upholding all the challenged sections of said legislation with the sole exception of Section 6(1), which was held to be unconstitutional and its enforcement accordingly enjoined. Appellant filed a "Motion to Alter or Amend Judgment" on February 6, 1975, requesting that the court change its order to conform with its Opinion, thereby declaring unconstitutional only the first sentence of Section 6(1) rather than the entire section. This motion was denied by the three-judge court on February 12, 1975. Appellant filed his Notice of Appeal in the United States District Court for the Eastern District of Missouri, Eastern Division, on March 14, 1975.

(iii) Jurisdiction of this Court is predicated upon 28 U.S.C. Section 1253, which authorizes a direct appeal of the order of a three-judge court declaring a state statute unconstitutional and enjoining enforcement thereof.

(iv) Cases which sustain the jurisdiction of this Court are: *Roe, et al.*, v. *Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); and *Gonzalez, et al.*, v. *Automatic Employees Credit Union, et al.*, —— U.S. ——, 95 S.Ct. ——, 42 L.Ed.2d 249 (1974).

(v) The complete text of Section 6(1) of House Committee Substitute for House Bill No. 1211 is as follows:

> "No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus

intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter and upon conviction shall be punished as provided in Section 559.140, RSMo. Further, such physician or other person shall be liable in an action for damages as provided in Section 537.080, RSMo."

QUESTIONS PRESENTED

I. Whether the Court below should have abstained from deciding the constitutionality of Section 6(1), House Bill No. 1211, because the meaning of the first sentence of Section 6(1) is subject to two conflicting interpretations, one of which would avoid or modify the necessity of reaching the constitutional problem raised by plaintiffs?

II. Whether the first sentence of Section 6(1), House Bill 1211, is unconstitutionally overbroad?

III. Assuming *arguendo* that the first sentence of Section 6(1) is unconstitutionally overbroad, is it severable from the remainder of Section 6(1)?

STATEMENT OF THE CASE

House Committee Substitute for House Bill No. 1211 was passed by the General Assembly of the State of Missouri on April 30, 1974, and was signed into law by the Honorable Christopher S. Bond, Governor of the State of Missouri, on June 14, 1974. An emergency clause was appended to this bill, and therefore, it became effective immediately upon approval by the Governor.

On June 17, 1974, Appellees Planned Parenthood of Central Missouri, Inc., Hall and Freiman filed suit in the United States District Court for the Eastern District of Missouri challenging the constitutionality of this statute and seeking an injunction against its enforcement. A statutory three-judge court was convened on June 19, 1974, pursuant to 28 U.S.C. Sections 2281 and 2284. Judgment was rendered on January 31, 1975, after a two-day hearing which was held on July 22 and 23, 1974. The court held that Sections 2(2), 3(2), 3(3), 3(4), 7, 9, 10, and 11 of House Bill No. 1211 were constitutional[2] and declared that Section 6(1) was unconstitutional and issued a permanent injunction against the enforcement of that section.

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[2] Appellees have appealed this part of the three-judge court's judgment to this Court. See *Planned Parenthood of Central Missouri, et al.*, v. *Danforth, et al.*, No. 74-1151 (October Term, 1974).

THE QUESTIONS ARE SUBSTANTIAL

The three-judge court below determined that most of the challenged sections of House Bill No. 1211 were constitutional. As previously noted, appellees have appealed to this Court that aspect of the three-judge court's decision. See *Planned Parenthood of Central Missouri, et al.*, v. *Danforth et al.*, No. 74-1151, October Term, 1974.

The questions on this appeal relate to the one section of House Bill No. 1211 found by the three-judge court to be unconstitutional—Section 6(1). Basically, the problem with regard to Section 6(1) is interpreting the language of the first sentence. Appellant and appellees interpreted the first sentence differently. Under appellant's interpretation, no constitutional problem would exist. Therefore, appellant urged the three-judge court to refer appellees to the Missouri state courts for an interpretation of this part of a statute which had never been applied before. The lower court, however, interpreted the language of the first sentence and declared the entire provision unconstitutional. By doing so, a federal court has maximized, not minimized, federal-state friction and rendered a possibly unnecessary constitutional adjudication contrary to this Court's direction in *Kusper* v. *Pontikes*, 414 U.S. 51, 54, 94 S.Ct. 303, 38 L.Ed.2d 260, 265 (1973).

Furthermore, having taken upon itself the unnecessary task of interpreting Section 6(1), the court below adopted an erroneous interpretation of the words of the first sentence and thereby created a constitutional problem which is resolved by striking down the entire section rather than only the offending sentence. Therefore, not only did the three-judge court below unnecessarily reach a constitutional question, but it declared unconstitutional more of a state statute than was necessary to resolve what it errone-

ously perceived to be a defect. Appellant submits that substantial questions worthy of this Court's review are raised when a federal court unnecessarily strikes down a state statute or any part thereof.

Interpreting Section 6(1) involves the question of whether the first sentence should be read with the second and third sentences or whether the first sentence pertains to circumstances distinct from those to which the other sentences apply. Section 6(1) reads as follows:

> "No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter and upon conviction shall be punished as provided in Section 559.140, RSMo. Further, such physician or other person shall be liable in an action for damages as provided in Section 537.080, RSMo."

Appellees, apparently focusing or the first sentence of Section 6(1), argued below that Section 6(1) requires that physicians in performing an abortion must exercise the same care and diligence as would be required during a delivery in which the fetus was intended to be born alive. (Appellees' Post-Trial Brief, p. 15.) Appellees' witnesses testified that it was medically impossible to exercise the same skill and diligence to preserve the life of a fetus during an abortion as would be exercised if the fetus were intended to be born alive. (Warren, T. 29, Kerenyi, T. 91.) Therefore, appellees argued below that Section 6(1), as

interpreted by them, had a "chilling effect" on the performance of abortions in Missouri. (Appellees' Post-Trial Brief, p. 15.)

Appellant below argued that, properly interpreted, the first sentence of Section 6(1) establishes a general standard of care applicable only if a live-born fetus results from an abortion. In the event and only in the event that a live-born fetus results, the physician must exercise the degree of professional skill, care and diligence to preserve the life of this living person as would have been used if it were intended that the fetus be born alive. In other words, the fact that a live-born fetus results from the performance of an abortion should not permit it to be treated differently than if it had been intended to be born alive. The second sentence of Section 6(1) provides that if the standard of care required by the first sentence is not followed, i.e. "shall fail to take such measures. . . .", and the live-born fetus dies, the physician or person assisting with the abortion shall be guilty of manslaughter.

Appellant's interpretation of Section 6(1)—that all three sentences in Section 6(1) pertain to a time after the pregnancy has been terminated—is the only interpretation supported by the evidence of legislative intent introduced in the evidentiary hearing held below. Representative O'Toole, the sponsor of House Bill No. 1211 in the Missouri General Assembly, testified that Section 6(1) was intended to preserve fetal health after the abortion was completed. Material had been distributed to various committees and members of the Missouri General Assembly describing things that had been done to fetuses born alive as a result of an abortion ". . . such as dropping a breathing fetus into a bucket of water." T. 180-181. In order to prevent such occurrences in Missouri, the General Assembly provided a standard of care applicable after the abortion has been

completed. To interpret Section 6(1) in conformity with that intent of the Missouri General Assembly does not contravene any right afforded any pregnant woman desiring an abortion.

The woman's pregnancy has been terminated *before* the standard of care provided for in Section 6(1) becomes operable. Whatever standard of care is appropriate for a physician in *performing* an abortion is left unaffected by Section 6(1). However, once the fetus is aborted alive, the physician must then exercise the prescribed standard of care. Certainly, if Missouri may regulate abortion in the interest of maternal health beginning at approximately the end of the first trimester, and if Missouri may proscribe abortion after viability except when abortion is necessary to preserve the life or health of the mother, "it is obvious the state can legislate to protect a live-born infant. . . ." *Planned Parenthood of Central Missouri, et al.*, v. *Danforth, et al.*, —— F. Supp. —— at ——; Appendix, p. A-15.

Even though, as the above quote indicates, the court below recognized the state's legitimate interest in protecting a live-born infant, the court below chose to interpret the first sentence of Section 6(1) as establishing a standard of care applicable prior to completion of an abortion. By erroneously interpreting Section 6(1), the lower court has prevented the State of Missouri from effectuating a legitimate state interest—protecting live-born infants—when to do so would not in any way affect a woman's right to an abortion or a physician's right to practice medicine. A substantial question is thereby raised which should receive full review by this Court.

Even if it is assumed *arguendo* that the first sentence of Section 6(1) is unconstitutionally overbroad, another serious and substantial question is whether the lower court

struck down more of Section 6(1) than was necessary. As appellant argued to the lower court in his "Motion to Alter or Amend Judgment," the three-judge court's Opinion focused on the first sentence of Section 6(1) as the offending portion of the section—"The court, therefore, holds that the first sentence of Section 6(1) is unconstitutionally overbroad for failure to exclude the stage of pregnancy prior to viability." Appendix, p. A-15. Even though the court below believed the first sentence to be the problem, and even though the lower court recognized that the second and third sentences referred to live-born infants which the state could protect, the court declared the *entire* section unconstitutional. No consideration was given by the three-judge court to whether the first sentence was severable from the balance of Section 6(1) even though Section B of House Bill No. 1211 specifically provides that all provisions are severable.[3]

In summary, this appeal raises several substantial questions relating to the propriety of the three-judge court's judgment that Section 6(1) of House Bill No. 1211 was unconstitutional and that its enforcement should be restrained. For the reasons stated herein, this Court should note probable jurisdiction and set this appeal on its docket

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[3] Section B of House Bill No. 1211 provides as follows:

"Section B. If any provision of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity does not affect the provisions or application of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable."

for plenary review with briefs and oral argument on the merits.

Respectfully submitted,

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